

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF PENNSYLVANIA

LEAH LAFERRIERE,	)	
	)	
Plaintiffs,	)	Civil Action
	)	06-5492
v.	)	
	)	
ZURICH AMERICAN INSURANCE	)	
COMPANY,	)	Philadelphia, PA
	)	November 18, 2008
	)	
Defendant.	)	

TRANSCRIPT OF HEARING  
BEFORE THE HONORABLE JOHN J. FULLAM  
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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I N D E X

ARGUMENT BY

Mr. Hirsch	3, 35
Mr. Waldenberger	14

1 (Call to the Order of the Court)

2 THE COURT: Good morning.

3 MR. WALDENBERGER: Good morning, Your Honor.

4 MR. HIRSCH: Good morning, Your Honor.

5 THE COURT: Be seated, please. Sorry to hold things  
6 up, but a good bit of the time was spent waiting for them to  
7 figure out how to lower the barriers into the courthouse.

8 They were stuck in both directions. This is argument  
9 on defendant's motion for summary judgment in the Leah  
10 Laferriere v. Zurich American.

11 Somebody wish to propose the motion?

12 MR. HIRSCH: Your Honor, Kevan Hirsch for defendant  
13 Zurich American Insurance Company.

14 THE COURT: It's your motion, so you better start  
15 talking.

16 MR. HIRSCH: I better. Okay. I believe, Your Honor,  
17 that we have three issues before us that relate to the --  
18 first, the plaintiff's contention of lowball settlement tactics  
19 leading to liability under the Bad Faith Statute, Section 8371.

20 Secondly, we have an issue relating to what conduct,  
21 in the course of an arbitration, called for under the insurance  
22 contract could lead to potential liability under that Bad Faith  
23 Statute.

24 And, third, we have the issue of whether or not the  
25 plaintiff has to show that there is some adverse impact, some

Hirsch - Argument

Page 4

1 harm resulting from activities that are claimed to be in bad  
2 faith. And if the Court please, I would address them seriatim.

3 THE COURT: Go right ahead.

4 MR. HIRSCH: With respect to the question of  
5 settlement and evaluations. The case law, I believe, breaks  
6 down into 3 types, which might permit liability under Section  
7 8371.

8 When we have a question whether the defendant failed  
9 to make a sufficient settlement offer so that a case had to go  
10 to arbitration or trial.

11 They break down into three categories. One, where  
12 there is no offer, like Klinger. Another where there's, if the  
13 case is clearly worth the limits of liability and the insurer  
14 will not offer them. And the third is where a carrier makes  
15 offers below their own evaluation and tries to stick with them.

16 In other words, to effectuate a situation where the  
17 plaintiff can't accept the offer, and it's clearly  
18 unreasonable.

19 And I don't think we have any of those here.

20 THE COURT: Is there any obligation on the part of an  
21 insurance company where the policy provides for arbitration, is  
22 there any obligation to make offers to avoid arbitration?

23 MR. HIRSCH: Well we have. And I would say -- I  
24 would say yes, if it's clearly a case where there is some  
25 liability, such as this one. There was no liability defense,

Hirsch - Argument

Page 5

1 so to speak. In other words, Ms. Laferriere was rear-ended and  
2 there was no question under the policy that she was an insured  
3 and so on.

4 THE COURT: Therefore, it's not your position, I take  
5 it, that all the insurance company has to do, since there is a  
6 provision for arbitration, is say to the client, okay, pursue  
7 your remedies and we'll pay whatever the arbitrators award.

8 You have to make an offer of some kind.

9 MR. HIRSCH: Yes.

10 THE COURT: Okay.

11 MR. HIRSCH: We agree with that proposition. That  
12 there is a good faith duty to try to resolve the claim.

13 THE COURT: Okay. What did you offer?

14 MR. HIRSCH: The last offer that was made by Zurich  
15 was \$125,000. It was first \$100,000, then \$125,000. And that  
16 was exclusive of the \$50,000 that Leah Laferriere received from  
17 the tortfeasor of 50,000, so that represented offers in the  
18 total amount of compensation for her, 150 to \$175,000.

19 THE COURT: Okay. So you think you did all right?

20 MR. HIRSCH: Well we made a good faith effort. And I  
21 would look at some of the other evidence here beyond mere 20/20  
22 hindsight looking at the award. But I would look at some other  
23 evidence, such as the evaluation of the case from the  
24 plaintiff's perspective by her UIM counsel.

25 Mr. Goldberg testified that, in his view, that a

1 range of settlement for this case should have been from  
2 \$185,000 to \$225,000.

3 And there were reasons why the parties -- that  
4 counsel differed. They had differences as to venue, they had  
5 differences as to the admissibility of evidence, such as a  
6 medical lien. There were bases for these conclusions that were  
7 made by counsel for Zurich, and the arguments that were made by  
8 counsel for Ms. Laferriere.

9 But the one factor that seems to escape my opponents  
10 here is that, in order to have a reasonable basis for your  
11 activities, you do not have to be right.

12 THE COURT: Well so you should prevail on the first  
13 point, you made adequate offers. What do you -- how do you  
14 handle the second point?

15 MR. HIRSCH: The second point, Your Honor, involves  
16 after -- I think it is important to recognize that, from a  
17 temporal standpoint, after the settlement negotiations were  
18 concluded, and both sides had pretty much, you know, they've  
19 come to an impasse. Ms. Laferriere would not lower her demand  
20 below \$375,000.

21 Zurich did not think that was reasonable. As her own  
22 counsel testified and she testified, they felt that they should  
23 take their chances at arbitration. So now we move into the  
24 realm of, what conduct in the course of an arbitration by  
25 counsel should be considered to be within the realm of the Bad

1 Faith Statute.

2 And I think that we must consider, first and  
3 foremost, that in the rather recent cases of Condio and  
4 Zappile, which are discussed at length in the parties' briefs,  
5 the Pennsylvania Superior Court has expressly recognized that  
6 UIM arbitrations and UIM cases are now recognized as inherently  
7 adversarial.

8 And while a duty of good faith remains between the  
9 insured and insured -- the insurer, we must recognize up front  
10 that this is akin to litigation.

11 Indeed now --

12 THE COURT: Right but --

13 MR. HIRSCH: -- we're not -- we have litigation.

14 THE COURT: Does that mean that you can direct your  
15 own medical expert to refuse to provide any information?

16 MR. HIRSCH: Well I believe that he must consent.  
17 The testimony was that, we preferred that he did not. There  
18 was never a threat. Dr. Grossinger testified it was a cordial  
19 conversation. There was no suggestion, other than, we would  
20 prefer it if you, as a testifying expert for our side, did not  
21 consent to the use of your report.

22 THE COURT: In effect, you said, please don't help  
23 the other side.

24 MR. HIRSCH: We did that in the context of an  
25 arbitration proceeding where the Rules of Evidence applied.

Hirsch - Argument

Page 8

1 THE COURT: And then the arbitration proceeding --  
2 and you also tried to keep his report out, right?

3 MR. HIRSCH: We --

4 THE COURT: You tried to keep out of evidence his  
5 report.

6 MR. HIRSCH: The initial objection was to the  
7 plaintiff's use of Dr. Grossinger's report. Yes.

8 THE COURT: What was the basis?

9 MR. HIRSCH: And then the objection was made to the  
10 panel of arbitrators.

11 THE COURT: What was the basis for the objection?

12 MR. HIRSCH: That, in effect, one would be compelling  
13 the testimony from an expert witness -- compelling a witness to  
14 give opinion testimony.

15 Which ordinarily one cannot do. It's sort of like  
16 taking the deposition of the doctor in the malpractice case and  
17 trying to get him to state his opinions. Akin to that.

18 The objection was raised, the arbitration panel  
19 agreed that consent would have to be given and --

20 THE COURT: Consent by whom?

21 MR. HIRSCH: Consent by Dr. Grossinger.

22 THE COURT: Well, of course.

23 MR. HIRSCH: And that, after the hearing, Mr. Meehan,  
24 counsel for Zurich, called Dr. Grossinger and spoke to him  
25 about it. After the hearing, Mr. Goldberg called Dr.



Hirsch - Argument

Page 9

1 Grossinger and spoke to him about it.

2 And Dr. Grossinger made the decision that he was not  
3 going to consent. At the same hearing --

4 THE COURT: Did he testify before the arbitrators on  
5 your behalf?

6 MR. HIRSCH: He did not. His opinion was ultimately  
7 not admitted into evidence. However, I would point out to the  
8 Court that, during the course of this argument to the  
9 arbitrators, Mr. Goldberg was given the opportunity, and  
10 testified that he did tell the arbitrators exactly what the  
11 report said.

12 And he was also --

13 THE COURT: Therefore, what? What's that got to do  
14 with anything?

15 MR. HIRSCH: Well it's got to do with the fact that  
16 what happened here did not result in any harm to the  
17 plaintiff's case.

18 THE COURT: You mean, the arbitrators would regard as  
19 evidence what the lawyer said that some witness had said?

20 MR. HIRSCH: Not exactly. But Mr. Goldberg testified  
21 that he thought that was a terrific advantage for him, and  
22 that, indeed, in making a motion to exclude all testimony  
23 relating to the shoulder injury, that Mr. Meehan made a huge  
24 strategic mistake.

25 He had argued both of those together. Sort of like

Hirsch - Argument

Page 10

1       you're making them -- you're --

2               THE COURT: In other words, so that your obstructive  
3       tactics actually helped the plaintiff?

4               MR. HIRSCH: Well I would not call them obstructive,  
5       Your Honor, I would call them in accordance with the Rules of  
6       Evidence --

7               THE COURT: That's how they character --

8               MR. HIRSCH: -- and the arbitrators make a decision.

9               THE COURT: -- that's how they would characterize  
10      them, I'm assuming.

11              MR. HIRSCH: I would. I would agree that they're  
12      going to characterize them as obstructive. But I would like,  
13      then, to return, if we might --

14              THE COURT: You're so used to suggesting that what  
15      they call obstructive tactics, if they're right that they are  
16      obstructive tactics, that because they backfired, there was no  
17      harm.

18              MR. HIRSCH: Well what I'm suggesting is that  
19      ultimately, however you characterize these activities, I would  
20      prefer that they be characterized as an aggressive defense in  
21      an arbitration proceeding, in accordance with the Rules of  
22      Evidence. No one's concealing everything. The arbitrators are  
23      presented with argument, and they make a decision.

24              At the same time, Mr. Goldberg was permitted to go --  
25      or thought he was -- had leave to go to his own doctor and fill

1 the hole in his case. And he does not dispute the fact that  
2 there was a hole in his case, because he did not have a doctor  
3 to say, with a reasonable degree of medical certainty, that Ms.  
4 Laferriere's shoulder injury was caused by the accident. And  
5 then he subsequently obtained such an opinion, and it was  
6 ultimately admitted before the arbitrators.

7 But when we proceed along this path about evidence  
8 before -- who can make the evidentiary arguments, and whether  
9 those would be characterized as obstructive, or not, do we not  
10 start down the path of reexamining every decision made in this  
11 type of proceeding on evidence and arguments that are made,  
12 statements that are made by advocates in part of a tribunal  
13 that's making the decision.

14 I think that a case that was decided before Condio  
15 and Zappile by the Third Circuit has some relevance here.  
16 Although it was not cited by the parties in their briefs. And  
17 that would be West Virginia Realty v. Northern Insurance, a  
18 2003 case, in which the Third Circuit spoke of the question,  
19 whether conduct during litigation should be considered within  
20 the Bad Faith Statute.

21 Now in that case we had to -- had to do with the  
22 discovery violation and so on. But what the Third Circuit had  
23 to say on litigation conduct was, under its analysis of the  
24 case law, what we're -- the cases where bad faith claims were  
25 permitted to proceed where the conduct is after litigation has

1       ensued.

2               All those cases involved, and I quote "Something  
3       beyond a discovery violation suggesting that the conduct was  
4       intended to evade the insurers' obligations under the  
5       contract."

6               And the insurers' obligations --

7               THE COURT: And you're citing that language in  
8       support of your position?

9               MR. HIRSCH: Because the insurers obligations here  
10       are to either pay -- they are to pay what the insured is  
11       legally entitled to recover as compensatory damages.

12              And if we cannot agree on the amount, then you go to  
13       arbitration. And the arbitration provisions are to be, it's  
14       conducted in accordance with the Uniformed Arbitration Act, and  
15       local rules of law as to arbitration procedure and evidence  
16       will apply.

17              So what we are arguing about is, under the Rules of  
18       Procedure and Evidence, is the defendant entitled to object to,  
19       first, the use of the report, second, to supplemental medical  
20       reports. That's all being decided by arbitrators.

21              And now that that's all decided and the plaintiff has  
22       received her result, which everyone thought was terrific, we  
23       are now back here to reexamine whether or not Zurich had a  
24       right to aggressively defend itself under the arbitration  
25       provisions of this contract.

1           And, indeed, nowadays, a UIM case can go to Court.  
2           In 2005, the Supreme Court of Pennsylvania decided that the  
3           insurance commissioner could not mandate arbitration any  
4           longer. So now we're going to have cases in UIM -- for UIM  
5           benefits that may actually go to Court.

6           So are we then going to go to reexamining everything  
7           that happens in a trial later, because we got a large verdict  
8           in the trial?

9           THE COURT: Certainly.

10          MR. HIRSCH: Or the whole pretrial procedure? I  
11          think it's akin to what Judge Waldman had to say in the Slater  
12          v. Liberty Mutual case.

13          THE COURT: What did he have to say?

14          MR. HIRSCH: Where he said -- pardon me?

15          THE COURT: What did he have to say?

16          MR. HIRSCH: What he said was, and I quote.

17          "Section 8371 provides a remedy for bad faith conduct  
18          by an insurer, in its capacity as an insurer. And not as a  
19          legal adversary in a lawsuit filed against it by an insured.  
20          The Court's confident that the legislature did not contemplate  
21          a potentially endless cycle of Section 8371 suits, each based  
22          on alleged discovery abuses by the insurer in defending itself  
23          in the prior suit."

24          Now the issue before Judge Waldman was a discovery  
25          issue, again. But here we have substantive objections to

Waldenberger - Argument

Page 14

1 evidence of procedure made, and an attempt to create from that  
2 -- from those arguments and those motions made before the  
3 arbitrators, a bad faith case.

4 THE COURT: So you think you should get summary  
5 judgement?

6 MR. HIRSCH: I do, Your Honor.

7 THE COURT: All right. Let's hear if the other side  
8 agrees.

9 MR. WALDENBERGER: Good morning, Your Honor. Jim  
10 Waldenberger for Leah Laferriere. I'm here with my co-counsel  
11 Jonathan Cohen.

12 MR. COHEN: Good morning, Your Honor.

13 MR. WALDENBERGER: And, no, Your Honor, we do not  
14 agree that summary judgment is appropriate. Your Honor, you  
15 listened to Mr. Hirsch for approximately 25 minutes. And I  
16 think what's telling there -- that was by my estimation --

17 THE COURT: It's actually 18 minutes.

18 MR. WALDENBERGER: Eighteen minutes. What's telling  
19 there is that there wasn't one mention of a claim note, or  
20 statements of any of the Zurich representatives. And that's  
21 really what this case is about.

22 This case is about the evaluation of Leah  
23 Laferriere's claim. As Your Honor is surely aware, Section  
24 8371 the Bad Faith Statute was put in place to prevent  
25 insurance companies from being deceitful, or overbearing, or

1 taking advantage of people.

2 And what's important in this case is to understand  
3 and appreciate the philosophy that is taken by Zurich, and  
4 their approach to claims handling here.

5 Now there are a few statements that I'll explain  
6 later, but I think are important, that are illustrative of what  
7 the Zurich representatives, that includes Zurich's UIM counsel,  
8 and how they handled the case.

9 Here's one. "Ortho IME was silent on causation,  
10 which was fine with us." That's one statement.

11 Another one. "Unfortunately, Grossinger also wades  
12 in on additional future care." Unfortunately. "We should have  
13 the neuro exam and report within 30 days. That would put us  
14 closer to the December holidays, which may be beneficial to  
15 settlement negotiations."

16 And Your Honor my favorite is, "Use the IME as  
17 leverage and argue lack of relationship with shoulder."

18 Statements like that by the Zurich representatives  
19 are not indicative of bad faith. What they show is a  
20 philosophy, a mind set to find a reason not to pay the case,  
21 and to lowball the case.

22 THE COURT: Well they have an obligation to their  
23 shareholders as well as to their insurers.

24 MR. WALDENBERGER: Your Honor, correct, that is  
25 correct. And the Court in Condio held precisely that.

1       However, that's not the issue here. What's interesting and  
2       what's important about the Condio case, is Condio does  
3       recognize that an un and under insured motorist case, when they  
4       go to arbitration, there is a degree of an adversarial nature.

5               However, what the Condio court specifically says is  
6       that the duty of good faith and fair dealing exists,  
7       nonetheless.

8               It's just that the insurer doesn't have to sacrifice  
9       its own interests --

10              THE COURT: Right.

11              MR. WALDENBERGER: -- in favor of that of its insured.  
12       Well in this case, Zurich was sacrificing Leah Laferriere's  
13       interest. And how that happened, Your Honor --

14              THE COURT: In what respect? What did they do to  
15       sacrifice her interest?

16              MR. WALDENBERGER: They performed an unreasonable  
17       evaluation and investigation in the case. And how that  
18       happened was that there was zero evaluation of her shoulder  
19       injury when it came to determining the value of her claim.

20              For example, probably the most telling evidence is  
21       exhibit 1 to plaintiff's -- to our response to motion for  
22       summary judgment, where in March of -- March 19th, 2004 Mark  
23       Allard, who was the -- Your Honor, do you want me to stop while  
24       you look at that?

25              THE COURT: No, that's okay.



Waldenberger - Argument

Page 17

1 MR. WALDENBERGER: Okay.

2 THE COURT: I'm listening intently.

3 MR. WALDENBERGER: In March of 2004, that is when  
4 authority for \$150,000 settlement was granted.

5 Now as you'll see in my brief, Mr. Allard testified  
6 -- or Mr. Steinbock testified, that was the Zurich  
7 representative, that, if he considered the shoulder, the case  
8 is worth \$225,000.

9 So let's do the math. A hundred and fifty thousand  
10 was what they reserved it for and granted authority for. If  
11 the shoulder's related, it's worth 225. But they never offered  
12 more than 125.

13 But more importantly than that, Your Honor, the day,  
14 or I should -- I'm sorry to say that two weeks after the  
15 \$150,000 authority was granted to settle the case, Steinbock,  
16 in exhibit 1, writes, "I have advised him that I would use the  
17 IME as leverage and argue lack of relationship of the shoulder  
18 in negotiations."

19 So what does that tell you? It tells you that  
20 they're not consider --

21 THE COURT: Well, frankly, it doesn't tell me  
22 anything. Because the print is so small you can't read what  
23 the heck it says.

24 MR. WALDENBERGER: Understood, Your Honor. But for  
25 the record, I'm able to read it, and what the note says, is

1 that -- and actually under the middle note, March 19, 2004,  
2 author, Ira Steinbock, category MCU, third paragraph.

3 "I have advised him that I would use the IME as  
4 leverage and argue the lack of relationship of the shoulder in  
5 negotiations."

6 And that is direct evidence that Zurich never  
7 considered the shoulder, was never going to consider the  
8 shoulder, and that statement doesn't stand alone.

9 THE COURT: Well you didn't finish the reading. I'm  
10 getting better at looking at it.

11 "The demand is 400k, there is only 3k in lost wages,  
12 and all meds have been paid."

13 MR. WALDENBERGER: Yes. And, Your Honor, for our  
14 purposes, the remainder of that note does not subtract from the  
15 fact that Zurich obviously was not evaluating or considering  
16 the shoulder in the evaluation of the case.

17 THE COURT: Right.

18 MR. WALDENBERGER: Which is further supported by the  
19 third party administrator with Sedgwick, who was handling part  
20 of the administration of the claim here. Their representative,  
21 Mark Allard, testified on page 40 of his deposition that the  
22 shoulder was not related.

23 When I took the deposition of Zurich's Ira Steinbock,  
24 and I asked him, was the shoulder related? Three highly,  
25 highly, highly doubtful that the shoulder was related.

1 He also mentioned that Dr. Grossinger, the doctor  
2 that Zurich hired to examine Ms. Laferriere, testified, or put  
3 in his report that the shoulder was related, but his opinion  
4 was, "discount it heavily," as Mr. Steinbock says on page 125  
5 of his deposition.

6 Then Mr. Meehan, Zurich's UIM counsel, when I asked  
7 him about, was the shoulder related? What did you think about  
8 the shoulder? He mentioned, well we -- we just disregarded Dr.  
9 Grossinger's opinion. And why, Your Honor, that disregard of  
10 the shoulder is unreasonable and lacked a reasonable basis, is  
11 because all the evidence in the case showed that the shoulder  
12 was related.

13 The accident was in December of 2000. In -- two  
14 weeks later, on December 28th, Leah goes to her family doctor  
15 and she complains of shoulder stiffness. She goes to  
16 rehabilitation, and the rehab records, and all of this outlined  
17 in the brief, between January 3rd 2001 and January 12th, 2001,  
18 there's five complaints relating to the shoulder.

19 Putting aside the evidence that was already in the  
20 file, the medical records showing the connection to the  
21 shoulder, the connection to the shoulder to the car accident,  
22 let's now discuss what Zurich found out while they were  
23 investigating the case.

24 They sent Leah for an orthopedic IME in August of  
25 2004 to see Dr. Bosacco.

Waldenberger - Argument

Page 20

1 Dr. Bosacco writes his report, there isn't a word in  
2 there that says that the shoulder injuries aren't related to  
3 the accident.

4 And Mr. Meehan --

5 THE COURT: Well does he say the shoulder injuries  
6 are related to the accident? Or he just doesn't discuss that  
7 issue?

8 MR. WALDENBERGER: Doesn't discuss the issue.

9 THE COURT: Thank you.

10 MR. WALDENBERGER: And when Mr. Meehan, in his e-mail  
11 to the Zurich representatives, which is at exhibit 6 to  
12 plaintiff's response, and, again, apologizing for the small  
13 writing, but what he puts in an e-mail.

14 "The Ortho IME, that's Dr. Bosacco, was silent on the  
15 causation issue, which was fine with us." Which was fine with  
16 us.

17 The next thing that Zurich learned, Your Honor, was  
18 when they sent Leah --

19 THE COURT: Well, you mean, if they expressed  
20 happiness at something that helps their cause, that's a sign of  
21 bad faith?

22 MR. WALDENBERGER: Yes.

23 THE COURT: Oh.

24 MR. WALDENBERGER: Because their cause, Your Honor,  
25 is to serve -- their cause is --

Waldenberger - Argument

Page 21

1 THE COURT: No, their -- their cause is not to give  
2 you more than you're entitled to.

3 MR. WALDENBERGER: Agreed, Your Honor. I will not  
4 stand here and tell you that the insurance company has to  
5 accept everything that the insured says is facts without --  
6 without performing an investigation.

7 THE COURT: Okay. What -- how were you damaged by  
8 the insurance company's conduct? What damages did you suffer?

9 MR. WALDENBERGER: Your Honor, under law of  
10 Pennsylvania, no proof of damages necessary. I can present and  
11 have calculated lost interest on the amount of the award, if  
12 Zurich would have paid us earlier.

13 THE COURT: So that, in your -- if the motion for  
14 summary judgment is denied, and the case goes to the jury, and  
15 the jury simply says, yes, there was bad faith, period. They  
16 don't award damages?

17 MR. WALDENBERGER: Correct, Your Honor.

18 Bad faith --

19 THE COURT: What's the point of suing?

20 MR. WALDENBERGER: Bad faith is a remedial statute.

21 And --

22 THE COURT: Remedial. What remedy do you want,  
23 that's what I'm trying to find out?

24 MR. WALDENBERGER: Punitive damages and attorney's  
25 fees as --

Waldenberger - Argument

Page 22

1 THE COURT: Attorney's fees, for what?

2 MR. WALDENBERGER: Attorney's fees for pursuing the  
3 bad faith case, Your Honor. Pursuant to the Willow Inn case,  
4 which is a Third Circuit case.

5 THE COURT: And what kind of punitive damages do you  
6 think you're entitled to?

7 MR. WALDENBERGER: Punitive damages for -- Your  
8 Honor, I'm not exactly sure but -- what you're asking. But --

9 THE COURT: I'm trying to find out why we're  
10 bothering with this case, if you don't know what you want.

11 MR. WALDENBERGER: Your Honor, we want punitive  
12 damages.

13 THE COURT: Well how much?

14 MR. WALDENBERGER: How much in punitive --

15 THE COURT: What do you think you're entitled to?

16 MR. WALDENBERGER: Your Honor, frankly, that's for  
17 the jury to decide the amount of the punitive damages. And the  
18 issue here is that, the insurance company, Zurich, acted in bad  
19 faith. And pursuant to Section 8371, when an insurer acts in  
20 bad faith, it is liable for punitive damages.

21 There is no requirement under the law that harm be  
22 proven. There's no Supreme Court -- Pennsylvania Supreme Court  
23 case that holds that. There's no Pennsylvania Superior Court  
24 case that holds that. There's no Third Circuit case that holds  
25 that.

Waldenberger - Argument

Page 23

1           And as a matter of fact, the Court in Birth Center,  
2           the Pennsylvania Superior Court noted that, the Bad Faith  
3           Statute is a remedial statute.

4           And that --

5           THE COURT: Of course it's remedial, all statutes are  
6           remedial. But I don't know what you're remedy is. I'm trying  
7           to find out.

8           MR. WALDENBERGER: The remedy, Your Honor, is that  
9           when an insurer acts in bad faith, the insurer is liable for  
10          punitive damages.

11          THE COURT: You want somebody to pull figures out of  
12          the air as to what the punitive damages should be. Who does  
13          the pulling out of the air?

14          MR. WALDENBERGER: The jury, Your Honor. The jury  
15          determine what the value of the bad faith is. And the  
16          purpose --

17          THE COURT: They could award anywhere from fifty  
18          cents to a million dollars.

19          MR. WALDENBERGER: That's within the province of the  
20          jury, Your Honor, that is correct.

21          THE COURT: What -- what guideposts would they be  
22          given, how would they be charged on the subject?

23          MR. WALDENBERGER: Well what's, Your Honor, important  
24          to remember --

25          THE COURT: Your colleague wants you to read what

1 he's prompting you with.

2 MR. WALDENBERGER: I've seen that. What is important  
3 to remember is that, deterrence is the issue. And an insurance  
4 company like Zurich, in a situation like this, cannot hamper  
5 witnesses. They cannot and should not contact their own IME  
6 physician, who provides a favorable report, and when the  
7 arbitration panel gives the UIM lawyer, the insurance lawyer  
8 says -- one thing that Mr. Hirsch said was that the arbitration  
9 panel agreed with Zurich's position, and that Leah Laferriere's  
10 counsel could go seek Mr. Grossinger's consent.

11 That's not correct. The arbitration panel didn't  
12 agree with Zurich at all. As a matter of fact, what actually  
13 happened was that, as Mr. Meehan, Zurich's UIM counsel  
14 testified:

15 "Unfortunately, the neutral arbitrator did not act on  
16 the objection. The panel decided that Mr. Goldberg should be  
17 afforded additional time to determine if Dr. Grossinger would  
18 consent to the use of the report."

19 So what did Mr. Meehan do, when he walked out of that  
20 arbitration hearing? He picked up the phone and he called Dr.  
21 Grossinger, and Dr. Grossinger said he was told that, we prefer  
22 that you not provide your consent and cooperation.

23 And Dr. Grossinger, as he testified, took that as  
24 being advised not to cooperate.

25 Your Honor, that is the type of conduct that needs to



1 be deterred, because Dr. Grossinger's report -- now Mr. Hirsch  
2 goes a lot into the, this is litigation, almost like this is  
3 gamesmanship.

4 Your Honor, this is not gamesmanship. This not  
5 litigation. This is an insurance company that has an  
6 obligation to evaluate Leah Laferriere's claim fairly and  
7 objectively. And it is not fair, and it is not objective when  
8 insurance company's own doctor provides an opinion on  
9 causation, and the insurance company does everything within its  
10 power, including contacting the doctor and telling him not to  
11 cooperate, after the arbitration panel give the UIM plaintiffs  
12 lawyer permission to do so.

13 That is the type of conduct that needs to be  
14 deterred. That is the type of conduct that warrants punitive  
15 damages. And that's the type of conduct that the jury needs to  
16 hear to understand what the value of the case is, and why  
17 conduct like Zurich's conduct cannot be condoned and cannot be  
18 repeated.

19 THE COURT: You opponent says that you have three  
20 issues you have to prove. And one of them is that the  
21 plaintiff was harmed by what the insurance company did. You  
22 disagree.

23 MR. WALDENBERGER: I disagree, Your Honor. And what  
24 I would -- I disagree on the law. The law does not require  
25 that. Under bad faith, the plaintiff has to prove two things.

1 Insurance company acts without reasonable basis and it had a  
2 reckless disregard for its lack of reasonable basis.

3 There have been opportunities for the courts to  
4 address that issue. And in Terletsky, the PA Superior Court,  
5 Zimmerman, PA Superior Court, Birth Center, Pennsylvania  
6 Supreme Court, Klinger Third Circuit, none have ever added this  
7 additional element of requiring harm.

8 And, Your Honor, if --

9 THE COURT: Have they expressly said that the  
10 plaintiff doesn't have to show harm?

11 MR. WALDENBERGER: No. They have not. However, Your  
12 Honor, what is instructive is that you take Hollock v. Erie,  
13 which is the largest UIM bad faith verdict in Pennsylvania, 2.8  
14 million dollars in punitive damages. The arb award was paid in  
15 that case. We have Bonenberger, 275 -- Bonenberger v.  
16 Nationwide, PA Superior Court, 275 in punitive damages.

17 That's an arb award in plaintiff's favor, too. The  
18 Klinger case, \$300,000 in punitive damages.

19 THE COURT: That argument is meaningless, since I  
20 don't know what any of those -- what the fact of any of those  
21 cases were and you don't either, apparently.

22 MR. WALDENBERGER: Your Honor, I do know the facts of  
23 the cases. The most important fact with all those cases, is  
24 that the plaintiff alleged bad faith in connection with the  
25 handling of the UIM case. And at the end of the day, the

Waldenberger - Argument

Page 27

1 arbitration award came in, and that in all of those cases  
2 the plaintiff --

3 THE COURT: Oh, well these are arbitrator's awards.

4 MR. WALDENBERGER: I'm sorry, Your Honor.

5 THE COURT: The arbitration award came in bigger than  
6 what they offered, right?

7 MR. WALDENBERGER: Correct. Yes.

8 THE COURT: How much bigger?

9 MR. WALDENBERGER: The specific facts of each of the  
10 individual cases regarding the numbers, Your Honor, I do not  
11 know. But the fact for which these cases are important here,  
12 and this analysis, is that those cases did not say that  
13 plaintiff wasn't harmed, there's no bad faith.

14 In that respect, these cases are very similar to the  
15 present case, where we have an arbitration award. If the rule  
16 was that plaintiff needs to prove harm, and harm means some  
17 element of financial loss, in any case when an insured goes  
18 through an arbitration process and receives an award, there'd  
19 be no potential bad faith.

20 And if that were the case, Your Honor, an insurance  
21 company would never have the incentive to ever pay cases,  
22 unless the arbitration award -- unless there's an arbitration  
23 compelling them to do so.

24 And that is not the intention of the law. It's not  
25 the intention of the statute. Specifically, the statute itself

Waldenberger - Argument

Page 28

1 doesn't even provide an element for compensatory damages.

2 Under 8371, if bad faith is proven, the plaintiff is entitled  
3 to punitive damages, attorney's fees, and interest.

4 There is no --

5 THE COURT: Interest on what?

6 MR. WALDENBERGER: Interest on the amount of the  
7 award and I believe it's --

8 THE COURT: For what period? In other words, first  
9 of all, in this case, did the arbitrators award any prejudgment  
10 interest, or not?

11 MR. WALDENBERGER: No, Your Honor. However, what we  
12 have --

13 THE COURT: And what is the time period between when  
14 you got the 50,000, and made your UIM demand, and the time of  
15 the arbitrators' hearing?

16 MR. WALDENBERGER: The UIM demand was in February of  
17 2004. The arbitration hearing was in October of 2005. What I  
18 have prepared was actually a much more conservative estimate  
19 than that, Your Honor.

20 And with Your Honor's permission, I will hand this  
21 up. I've already provided a copy to Mr. Hirsch this morning.  
22 May I approach, Your Honor?

23 THE COURT: Of course. As long as it doesn't explode  
24 when it gets here.

25 MR. WALDENBERGER: Your Honor, what that document

1 represents -- again, Your Honor, this is an alternative  
2 argument. My argument, number one, is harm is not required.  
3 It's not required under the law, it's not required under the  
4 statute.

5 However, if there is some element of harm required,  
6 what this document shows is that I asked what type of interest  
7 somebody would lose between January 4, 2005 and October 28,  
8 2005. And I'll give you the significance of those dates.

9 January 4, 2005 is the day that Zurich received Dr.  
10 Grossinger's report relating the shoulder injury and all the  
11 other injuries to the incident. So I would think, at the  
12 earliest possible time -- or I'd say the latest possible time,  
13 Zurich was on notice as of January 4, 2005, when its own doctor  
14 told them she was hurt, that this is a case that should have  
15 been paid.

16 THE COURT: Well just where did you get the \$318,000  
17 principal amount?

18 MR. WALDENBERGER: \$318,000 was the amount of the  
19 arbitration -- arbitrators' award, after the deduction of the  
20 50,000 for the third party driver.

21 THE COURT: What was your demand before -- your final  
22 demand before arbitration?

23 MR. WALDENBERGER: \$375,000. So what this document  
24 shows, Your Honor --

25 THE COURT: No, your 375 included the 50 you already

Waldenberger - Argument

Page 30

1 got, or is this what you wanted over and above the 50?

2 MR. WALDENBERGER: Additional.

3 THE COURT: So you valued the case at over \$400,000.

4 MR. WALDENBERGER: Total, if you add in the UIM money  
5 and the third party money, yes, Your Honor. You are correct.

6 THE COURT: Thank you.

7 MR. WALDENBERGER: And what this document shows is  
8 that, if Zurich would have paid the net value of the arb award  
9 when they learned of -- when they had Dr. Grossinger's report,  
10 if you -- if the loss is based on investment and equities,  
11 you're looking at \$21,000 in a loss of interest.

12 If it's loss based on bond and money market fund  
13 investment, you're looking at \$9,234. Now, Your Honor, if harm  
14 is required, if Your Honor feels, or holds that harm is  
15 required, that is the harm that we can present.

16 But I can't emphasize enough that the law of  
17 Pennsylvania is that no such harm is required. And if harm  
18 were required in bad faith cases, insurance companies would be  
19 able to engage in lowball tactics and delay and never pay.

20 THE COURT: Well now, just as a matter of curiosity.  
21 My understanding, perhaps improper, is that in calculating  
22 prejudgment interest or delay damages, you apply a set rate, do  
23 you not?

24 MR. WALDENBERGER: That is correct, Your Honor, but  
25 that is not the figures we're referring to here. That's a

Waldenberger - Argument

Page 31

1 different analysis. What this number represents was that, if  
2 Zurich paid the \$318,000 when it should have paid it, that  
3 money could have been in Leah Laferriere's back account and  
4 then used in one of these two particular modes, and would have  
5 netted --

6 THE COURT: Sure.

7 MR. WALDENBERGER: -- would have created the interest  
8 that we see here.

9 THE COURT: You wouldn't be making that argument if  
10 the time period were a little later, though, would you?

11 Okay.

12 MR. WALDENBERGER: So, Your Honor, moving from the  
13 harm issue, if Your Honor is content that that issue is -- you  
14 don't need to hear anything else on that.

15 THE COURT: Right.

16 MR. WALDENBERGER: What --

17 MR. HIRSCH: From me, Your Honor?

18 THE COURT: Oh, possibly.

19 MR. WALDENBERGER: Going back to --

20 THE COURT: Basically, I'm trying to find out what  
21 you guys are fighting about, whether it's worth the effort and,  
22 I don't think it is, frankly.

23 MR. WALDENBERGER: Going back to the lack of  
24 reasonable basis, Your Honor, and not having -- and not  
25 evaluating the shoulder, what's important to know is, that

1 Zurich never had an opinion, medical opinion, refuting the  
2 relationship of the shoulder, until October 20, 2005, which was  
3 one week before the arbitration hearing.

4 This UIM case was opened on February 4, 2004. And  
5 between that time and the time of the arbitration, a year and a  
6 half later, the only evidence that Zurich ever had was that  
7 that shoulder was related to the accident.

8 THE COURT: And a week before the hearing, they got  
9 some evidence that confirmed that, or disagreed with it?

10 MR. WALDENBERGER: A week before the arbitration  
11 hearing they got a report from Dr. Bosacco, who was silent on  
12 the issue before. And his new report says that, she likely did  
13 not have a shoulder injury related to the accident, because the  
14 treatment records don't show an injury to the shoulder being  
15 treated for after the accident.

16 Well why that is outrageous, Your Honor, is, number  
17 one, the evidence that I related to you earlier regarding the  
18 December and January medical records notes that showed she did  
19 treatment on the shoulder.

20 Apparently Dr. Bosacco ignored that. But what is  
21 particularly interesting, is that that same mistake that Dr.  
22 Bosacco says in October of 2005, that there's no complaints of  
23 shoulder until May of 2001, that same mistake was made by Mr.  
24 Meehan in filing a motion in limine presenting it to the  
25 arbitration panel, where he says that there were no treatment



1 notes before May of 2001.

2 THE COURT: So you should be suing Dr. Bosacco and  
3 Mr. Meehan for bad faith.

4 MR. WALDENBERGER: Your Honor, Mr. Meehan -- Zurich  
5 is responsible for Mr. Meehan's conduct. Mr. Meehan was  
6 Zurich's representative, in this case. Mr. Meehan was acting  
7 on behalf of Zurich in this case, and the Klinger case  
8 specifically holds that an insurance company can be responsible  
9 for the acts taken by its lawyer handling a UIM case.

10 Which leads me to my next point. And that is, Mr.  
11 Hirsch went to great lengths to cite cases to you about how  
12 litigation conduct is not bad faith.

13 What the common most distinguishing characteristic of  
14 all of those cases, Your Honor, Mr. Hirsch specifically noted  
15 the Slater case. But there's the Slater case he cites, the  
16 O'Donnell case, International Surplus Lines out of Wyoming, and  
17 the Sims case out of Oklahoma.

18 What's the same about all those cases, is that the  
19 discovery conduct in litigation -- the litigation conduct  
20 that's at issue is the bad faith litigation conduct. That  
21 would be the same as if I was alleging that Mr. -- which I'm  
22 not, if I was alleging Mr. Hirsch was engaging in some improper  
23 acts, and I was trying to say that Zurich is responsible for  
24 Mr. Hirsch's conduct. And I'm not saying that.

25 And we're not saying that in this case. We're saying

1 that the conduct of Mr. Meehan, as Zurich's representative in  
2 the under insured motorist proceeding, or under insured  
3 motorist claims handling, was unreasonable and was in bad  
4 faith.

5 He, along with Mr. Allard and Mr. Steinbock, did not  
6 consider the shoulder. And they recklessly disregarded the  
7 fact that they didn't have any basis for the shoulder.

8 THE COURT: Who were the arbitrators? Do you  
9 remember? Does anybody know?

10 MR. WALDENBERGER: Yes. Plaintiff's arbitrator was  
11 Michael Murphy. The neutral arbitrator was, I believe George  
12 Noel and the --

13 MR. HIRSCH: That was our arbitrator.

14 MR. WALDENBERGER: Zurich's arbitrator was George  
15 Noel. And the neutral was Gerald Montella.

16 MR. HIRSCH: Right. All three Delaware County  
17 lawyers.

18 MR. WALDENBERGER: Your Honor, Zurich had the  
19 information all along to know that the shoulder injury was  
20 related to the accident. It was in the medical records. Their  
21 own doctor told them it was related. And rather than do the  
22 fair thing and the honest thing, and that is consider all of  
23 that evidence and their own doctor's opinion, and properly  
24 evaluate the case, which, incidentally, they internally valued  
25 at 225, \$225,000, again, but then never even offered that much,

1 was that, to do the fair thing would have been to consider all  
2 of that evidence and pay this claim appropriately. Make  
3 appropriate offers. And that's not what they did.

4 What they did is, they took every measure possible to  
5 prevent Dr. Grossinger's opinion from being known by the UIM  
6 counsel, from having it considered by the arbitration panel,  
7 and for having his report known and fully appreciated and  
8 understood by those individuals who have to consider the value  
9 of the case.

10 You add onto that the fact that they did not have  
11 support for their conclusions that the shoulder was not related  
12 until a year and a half later, one week before the arbitration  
13 proceeding, is nothing short than bad faith. And, at the very  
14 least, there's a genuine issue of fact that warrants the jury's  
15 consideration as to whether or not Zurich acted reasonably and  
16 appropriately in this case.

17 THE COURT: Thank you.

18 MR. WALDENBERGER: Thank you.

19 THE COURT: You're persuaded, I assume?

20 MR. HIRSCH: Well, Your Honor, what I heard was not  
21 evidence that was so clear, direct, weighty and convincing as  
22 to enable a clear conviction without hesitation about whether  
23 or not the insurer acted in bad faith.

24 THE COURT: Well who says you can't hesitate?

25 MR. HIRSCH: The Third Circuit in J.C. Penny Life

1 Insurance Company v. Pilosi.

2 THE COURT: What was the issue there?

3 MR. HIRSCH: Pardon me?

4 THE COURT: What was the issue there?

5 MR. HIRSCH: The issue was that they were -- that  
6 particular comment is directed to summary judgment on bad faith  
7 claims. And the fact that you must consider the burden of  
8 proof that the plaintiff has at trial in considering a motion  
9 for summary judgment.

10 THE COURT: Who wrote the opinion?

11 MR. HIRSCH: Judge Rosen, fourth panel of McKee,  
12 Rosen and Weiss.

13 THE COURT: Judge Rosen?

14 MR. HIRSCH: Yes.

15 THE COURT: Max Rosen?

16 MR. HIRSCH: Yes.

17 THE COURT: That was a long time ago, then.

18 MR. HIRSCH: 2004.

19 THE COURT: That's a long time ago.

20 MR. HIRSCH: Now, if I might, we focused for some  
21 time upon little bits and snippets of evidence that were read  
22 to the Court that were allegedly showing some sort of mind set  
23 of denial.

24 But what we didn't focus upon, was just what is it  
25 that Leah Laferriere was owed as of January 4, 2005.

1 THE COURT: \$380,000.

2 MR. HIRSCH: That would be a little high, because it  
3 was 318 they came back with.

4 THE COURT: Oh. Okay.

5 MR. HIRSCH: Okay?

6 THE COURT: 318, okay.

7 MR. HIRSCH: Because that's the question. I mean,  
8 the question in all of these cases on failure to settle is, is  
9 there some clear benchmark to which the insurer's got to reach  
10 in order -- is there some amount clearly owed that the insurer  
11 failed to pay? Okay?

12 And here we have a case that people evaluated quite  
13 differently. And, in fact, despite the insistence by Mr.  
14 Waldenberger that zero dollars were allocated for the shoulder,  
15 Mr. Meehan wrote to his clients on January 24th, 2005, it's  
16 Exhibit C to our initial moving papers, and he says:

17 "As we discussed, we had evaluated this matter in a  
18 range of \$125,000 to \$150,000, without taking the deduction of  
19 the tortfeasor's 50,000 in insurance coverage into account.  
20 However, this was before the additional shoulder surgery. We  
21 believe that this procedure probably adds another \$25,000 to  
22 the case. As a result, we recommend valuing this matter in the  
23 150 to \$175,000 range, with a net exposure to Nationwide/Zurich  
24 of 100 to \$125,000. Any offer within that range would be a  
25 fair and reasonable offer to Ms. Laferriere."

Hirsch - Argument

Page 38

1           Okay? The shoulder was considered.

2           THE COURT: And did you -- what offer did you make,  
3 if you know.

4           MR. HIRSCH: The offer -- both of those offers were  
5 made. First \$100,000, then \$125,000, by Mr. Meehan. And it  
6 was declined.

7           And, furthermore, after the \$125,000 was offered,  
8 there is evidence in the record that Mr. Meehan was told that  
9 this case -- that the client wanted this case to go to  
10 arbitration. And that it was going to go. And there was no  
11 reason for Zurich to offer the amount that it had reserved,  
12 which is a different thing at the beginning --

13          THE COURT: Right.

14          MR. HIRSCH: -- they reserved \$150,000. It wouldn't  
15 be accepted. Now how much -- what science is there to tell us  
16 now where between \$125,000 and \$375,000 this case should come  
17 out at?

18          THE COURT: I think you ask the Kline & Specter firm.  
19 They're knowledgeable in this deal.

20          MR. HIRSCH: Yes. So, overall, I would say, with  
21 respect to the exhibit that was handed up to you, I would say  
22 that, how does one calculate the amount of \$318,000?

23          Where does that come from? Only 20/20 hindsight,  
24 which the Pennsylvania case law specifically has appealed, says  
25 is not evidence of bad faith.

1           You can't use settlement offers and results as the  
2       objective evaluation of a claim. It could just as easily have  
3       come in in favor of Zurich and been \$100,000 instead of 125,000  
4       -- or \$318,000.

5           I would also point out that, when we're talking about  
6       harm here to Ms. Laferriere, this exhibit, and I think that  
7       Your Honor's drift might have been going towards sort of BMW v.  
8       Gore and progeny, where punitive damages have to, as a  
9       constitutional matter bear some relationship to --

10       THE COURT: Right.

11       MR. HIRSCH: -- the compensatory loss. I would point  
12       out here that, when we look at this exhibit and when we start  
13       calculating what we're moving towards is a delay claim. Now  
14       although --

15       THE COURT: Yes.

16       MR. HIRSCH: -- we start this process on January 4,  
17       2005, no one knows what she's owed, at that point, or anytime  
18       later. In fact, we're not even going to know what she might be  
19       owed until May 24th, 2005, when the first arbitration hearing  
20       was scheduled.

21       So now we're in the time period between May and  
22       October of 2005. We have two continuances. One is to help  
23       plaintiff seal up the hole in their case by getting consent  
24       from Dr. Grossinger, or getting a supplemental report. And  
25       another's due to Mr. Meehan's objection about using a

Hirsch - Argument

Page 40

1 supplemental report, and to give him a chance to get one  
2 himself.

3 Because, although it was touted to you that Dr.  
4 Bosacco changed his opinion and was so suspect, well Dr.  
5 Hummer, plaintiff's physician, Dr. Hummer was the one who wrote  
6 the note, and I quote:

7 "It is not clear to her or to me that the motor  
8 vehicle accident was the cause of the shoulder pain, but the  
9 onset was temporally related."

10 Now he wrote that note back in 2001, I believe, and  
11 then, in 2005, he changed his opinion after getting a couple of  
12 letters from the plaintiff's UIM lawyer, which I haven't seen,  
13 because no one can look at those letters.

14 So he changed his opinion, too.

15 THE COURT: You're suggesting those letters included  
16 a check?

17 MR. HIRSCH: I think one of them did. But not enough  
18 to make a difference. That's not exactly what we were talking  
19 about, but --

20 THE COURT: Okay.

21 MR. HIRSCH: -- I think Your Honor's correct. So we  
22 had two -- two doctors juxtaposed, who gave differing opinions,  
23 if you believe that what Mr. Waldenberger has characterized as  
24 a suspect opinion by Dr. Bosacco. We have an equally suspect  
25 opinion by Dr. Hummer.



Hirsch - Argument

Page 41

1           And they're put before the arbitrators and they make  
2           their award. Then we're right back smack in the middle of  
3           litigation.

4           That's what litigation is for. It's not what bad  
5           faith -- it's not bad faith conduct to conduct an aggressive  
6           defense. I mean, we get -- and, indeed, you know, there -- the  
7           insurance company's obligations here, you know, Zurich's  
8           obligations here -- Zurich's being sued, because they were  
9           protecting, first, a \$250,000 deductible by Nationwide.

10          And, second, Zurich. So to say that Zurich's acting  
11          solely in its own interest, is incorrect.

12          THE COURT: Wait a minute, you lost me on that what  
13          was --

14          MR. HIRSCH: Okay. This Nationwide -- the Nationwide  
15          Mutual Insurance Company was the named insured. Ms. Laferriere  
16          was an employee of Nationwide Mutual Insurance Company. And  
17          that is how she was entitled to coverage.

18          THE COURT: Well what's this 250 --

19          MR. HIRSCH: The Nationwide policy has a \$250,000  
20          deductible in it. So that Nationwide pays the first \$250,000  
21          on any UIM claim. And Zurich only thereafter. So in defending  
22          this arbitration case, Zurich is not acting solely in its own  
23          interest, but also in the interest of Nationwide.

24          Which is on the hook for the first \$250,000 here. So  
25          this is not a case of solely self interest.

Hirsch - Argument

Page 42

1 THE COURT: So that, basically, the plaintiff, her  
2 UIM claim was against her employer.

3 MR. HIRSCH: That's correct.

4 THE COURT: That's strange.

5 MR. HIRSCH: For the first \$250,000, it certainly  
6 was.

7 THE COURT: And how does that tie in with workers'  
8 compensation laws?

9 MR. HIRSCH: I think we're once removed, because of  
10 the interposition of zurich there.

11 But, you know, we hear these sound bites, you know,  
12 we hear the little sound bites, like that Dr. Bosacco's opinion  
13 was fine with us.

14 Well it's fine with us, because in this context,  
15 where she has to prove what she's legally entitled to as  
16 compensatory damages, it's not Zurich's burden of proof to show  
17 causation, it's her's.

18 And, you know, we come to another little vignette  
19 here about how Mr. Meehan contacted Dr. Grossinger and said,  
20 I'd prefer you don't give your consent.

21 Well are we to then be in a position here to be  
22 subject to punitive damages because, in the contested  
23 arbitration, our counsel contacted his expert witness?

24 THE COURT: Just a matter of curiosity, was Mr.  
25 Meehan an employee or a --

Hirsch - Argument

Page 43

1 MR. HIRSCH: Mr. Meehan was an associate of the law  
2 firm of Rawle & Henderson. And I would dispute highly Mr.  
3 Waldenberger's characterization that in all instances Mr.  
4 Meehan is considered to be the agent of the insured.

5 THE COURT: Well regardless of that --

6 MR. HIRSCH: Pardon me?

7 THE COURT: -- have you suggested that Mr. Meehan  
8 should contact his own liability insurer?

9 MR. HIRSCH: No one has suggested that. And Mr.  
10 Meehan will be a witness in this case.

11 THE COURT: Well --

12 MR. HIRSCH: And -- but I would point out to the  
13 Court that this is not -- that there is an independent  
14 contractor issue here, too, on whether or not Mr. Meehan, you  
15 know, that Zurich is totally responsible for it, all the  
16 conduct.

17 One of the materials that plaintiff cited here was a  
18 PaTLA brief on amicus curiae case. But if you go to the  
19 underlying case, which is Harleysville Insurance v. --  
20 Ravendran v. Harleyville Insurance, which is found at 2002  
21 Westlaw 32516203.

22 You will see that the trial court opinion in that  
23 case, which was subsequently affirmed, addresses this issue and  
24 says that an attorney -- well as a general proposition can be  
25 an agent, they can also be an independent contractor hired by

Hirsch - Argument

Page 44

1 the insurance company. And, therefore, any conduct by the  
2 attorney cannot be imputed to the client.

3 So if there is some evidence that the Zurich  
4 personnel is directing these particular things, and there's not  
5 in all cases, such evidence. But that I think is more --

6 THE COURT: So that --

7 MR. HIRSCH: -- of an issue for trial, because I  
8 wanted to come back to --

9 THE COURT: Your argument is that, all an insurance  
10 company has to do to avoid bad faith claim, is to make sure  
11 that all the bad faith was exercised by their hired attorney?

12 MR. HIRSCH: Well that would be a little extreme,  
13 Your Honor. And I think that's exactly what the situation was  
14 in Klinger where the insurance carriers tried to blame its  
15 counsel for all these activities, and says we're not  
16 responsible for him.

17 Okay? I mean, that's not the case here. But to  
18 argue as a general proposition an agency theory that the  
19 insurer can be liable for any conduct, I think is incorrect.

20 Your Honor asked about this issue, again, of punitive  
21 damages and some of the facts of the cases involved. Well, you  
22 know, the case that stands out to me in this situation, we have  
23 Hollock v. Erie, and that was a large punitive damage award.

24 But let's look at what the offer was. The offer of  
25 settlement was 29 times less than the arbitration award. The

Hirsch - Argument

Page 45

1 arbitrators awarded \$865,000. It was 29 times less. It bore  
2 no relationship --

3 THE COURT: My primary school mathematics --

4 MR. HIRSCH: I think it's about -- is it about  
5 \$30,000?

6 THE COURT: -- is a little bit rusty. But --

7 MR. HIRSCH: I was looking in the opinion.

8 THE COURT: I have trouble thinking of anything as  
9 being so many times less. You're saying it's one twenty-ninth  
10 of?

11 MR. HIRSCH: Yes. I think it was something like --

12 THE COURT: It's not 29 times less.

13 MR. HIRSCH: -- \$30,000. And, you know, they had --  
14 the insurance carrier in that case had in front of it, you  
15 know, that was less than the medical expenses, than the unpaid  
16 medical expenses. They had wage loss projection of over  
17 \$100,000 in front of them.

18 It was -- it bore no reasonable relationship to the  
19 claim at issue. Okay? And if we look at Hollock, we also need  
20 to look at what happened when Hollock went from the Superior  
21 Court to the Supreme Court.

22 And although --

23 THE COURT: What did happen?

24 MR. HIRSCH: -- and although it was dismissed as  
25 improvident, Justice Cappy, joined by Justice Castille issued

1 an opinion in which, when one reads it, we're doing a little  
2 Erie predictive analysis here.

3 When one reads that opinion, it comes across as  
4 pretty clearly that, at least two justices, one's still  
5 sitting, I believe that Section 8371 is not intended to reach  
6 litigation conduct.

7 Okay. We've cited that opinion in our brief and we  
8 recommend it to -- because the trend here is to shrink the  
9 application of the statute. Indeed, in one last case, that was  
10 not cited in the briefs, this is the Third Circuit case UPMC  
11 Health System v. Metropolitan Life, it's found at 391 F.3d 497.

12 In that case --

13 THE COURT: Well why isn't it in your brief, if it's  
14 all that important?

15 MR. HIRSCH: Well, you know, it was not all that  
16 important, it's just that we're moving so far away from what  
17 the statute, I thought, was intended to address. And also  
18 we're moving into the realm of a delay claim, which really  
19 wasn't raised here, in response to this motion for summary  
20 judgment.

21 I mean, we didn't have a situation -- we want to  
22 address it. I raised it initially, and I said that Mr.  
23 Goldberg, you know, gave his opinion that this did not take an  
24 inordinately amount -- long amount of time.

25 There were delays on both sides here. And, you know,

1 that's just not sufficient. So but in UMPC Health System  
2 (sic), the Third Circuit was confronted with a case where  
3 conduct was alleged where the insurance carrier was supposedly,  
4 through a violation of the Unfair Insurances Practices Act,  
5 trying to obtain additional premiums from the insured. And the  
6 question was raised whether this would not be bad faith conduct  
7 under Section 8371.

8 The Third Circuit says that, you know, the activity  
9 has to result from some denial of benefits to be within the Bad  
10 Faith Statute. Under the definitions in Terletsky and other  
11 cases following.

12 And now other -- some cases have recognized that, you  
13 know, the sort of the justice delayed, is justice denied  
14 theory, and recognized that, in the long periods of time  
15 elapsing because of undue conduct by the insurer --

16 THE COURT: Well you denied him the difference  
17 between what the arbitrators awarded and what your offer was,  
18 right?

19 MR. HIRSCH: If one could predict that, as of January  
20 4th, 2005, or as of May 24th, 2005 --

21 THE COURT: We can predict it easily now, what the  
22 amount is.

23 MR. HIRSCH: We certainly can. Which is why it's  
24 incompetent as evidence of bad faith standing alone.

25 THE COURT: Okay. Far be it from me to cut everybody

1 short, but I think I've heard all I want to hear. I am totally  
2 amazed at how much effort you gentlemen have put into this  
3 case, just judging by the paperwork alone.

4 I will, of course, take it under advisement and  
5 render a superb decision, which probably neither side will  
6 like.

7 I will, however, give you the benefit of my current  
8 thinking, which is that the one possible element that might  
9 warrant a bad faith award is the trying to shut out the medical  
10 opinion of the defendant's own doctor.

11 My suggestion is that the damages sustained by the  
12 plaintiff are minimal, and that the punitive award, if any,  
13 would be somewhat -- would be extremely moderate, would have to  
14 be in order to past muster at all.

15 And I'm not sure that counsel fees or the  
16 expenditure, based on the paperwork involved, whether the case  
17 warranted that kind of attorney effort.

18 To make a long story short, what I'm going to suggest  
19 is the following. I'm going to recess for 10 minutes and  
20 direct counsel to explore vigorously the possibility of  
21 settling this case on some modest basis, which will avoid  
22 further wasted effort on both sides.

23 MR. WALDENBERGER: Your Honor, to the extent that  
24 it's important to you, we have a mediation scheduled for this  
25 Friday.



1 THE COURT: Pardon?

2 MR. WALDENBERGER: We have a mediation scheduled for  
3 this Friday.

4 THE COURT: Oh, before whom?

5 MR. WALDENBERGER: Before Tom Rudder of ADR Options.

6 THE COURT: Okay. I will hold off, then, until after  
7 I hear from you with the result of that. Okay. My suggestion  
8 would be that both sides try to be more reasonable than you  
9 have been up until now. Okay?

10 Recess until further notice.

11 (Court adjourned)

12 \* \* \* \* \*

13 C E R T I F I C A T I O N

14 I, Josette Jones, court approved transcriber, certify that the  
15 foregoing is a correct transcript from the official electronic  
16 sound recording of the proceedings in the above-entitled  
17 matter.

18

19 -----

20 JOSETTE JONES

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21 DATE

DOMAN TRANSCRIBING